

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

MICROSOFT CORPORATION,)	
)	
Plaintiff,)	No. C10-1823JLR
)	
v.)	
)	
MOTOROLA, INCORPORATED,)	
)	
Defendant.)	

TELEPHONE CONFERENCE

BEFORE THE HONORABLE JAMES L. ROBART
UNITED STATES DISTRICT COURT JUDGE

February 13, 2012

APPEARANCES:

For the Plaintiff: Arthur Harrigan
DANIELSON HARRIGAN LEYH &
TOLLEFSON

For the Defendant: Jesse J. Jenner
ROPES & GRAY

Also Present: Christopher Wion
Lynn Engel
Ralph Palumbo
Philip McCune
Andy Culbert
Rick Cederoth
Steve Pepe

1 THE COURT: Good afternoon, counsel. This is
2 Judge Robart.

3 MR. WION: Good afternoon, your Honor.

4 MR. HARRIGAN: Good afternoon.

5 THE COURT: Why don't we do appearances, and then
6 we will go from there?

7 MR. HARRIGAN: Your Honor, this is Art Harrigan.
8 With me around this telephone are Chris Wion, my partner,
9 and Andy Culvert from Microsoft. On the phone from
10 Chicago is Mr. Cederoth from the Sidley firm.

11 THE COURT: All right. Who is going to be
12 speaking on behalf of Microsoft?

13 MR. HARRIGAN: I will be, your Honor.

14 RALPH PALUMBO: This is Ralph Palumbo on behalf of
15 Motorola. I believe on the phone we have Mr. Jenner --

16 MR. JENNER: Good morning, your Honor.

17 RALPH PALUMBO: -- Mr. McCune, Ms. Engel. Is
18 there anyone else on the phone?

19 MR. PEPE: Yes, Steve Pepe here. With me is Jesse
20 Jenner. Kevin Post is on the phone in another of our
21 offices.

22 RALPH PALUMBO: And Mr. Jenner will be speaking
23 for us, your Honor.

24 THE COURT: Thank you. Counsel, just in your
25 honor I am wearing my black robe since that makes me

1 infallible.

2 I am here to announce that we are opening the second
3 front in this war, namely the RAND contract issues. I am
4 hoping that you all will help me feel my way through this.

5 I will tell you that we are within a week to ten days
6 of ruling on Microsoft's motion for partial summary
7 judgment, which is found in the docket at 77. Anything
8 that I say today shouldn't be taken as we have made up our
9 mind on that, but there are obviously some issues in there
10 that we will need your help with.

11 Just so that we will get off on a solid footing here,
12 in Microsoft's memorandum, Page 9 of 31, it sets forth
13 what it says are the four summary judgments -- partial
14 summary judgments that it seeks in this. The first of
15 which is, and I am reading Microsoft's language, "Motorola
16 entered into binding contractual commitments with the
17 Institute of Electrical and Electronics Engineers,"
18 parens, IEEE, "and the International Telecommunications
19 Union," parens ITU, "committing to license its
20 declared-essential patents on RAND terms and conditions."

21 Now, I understand those to be the 802.11 WLAN,
22 W-L-A-N, and capital H period 264 Technologies.

23 As best we can tell, no one thinks that is
24 inaccurate, but since I am putting words in Motorola's
25 mouth, I will ask them first.

1 MR. JENNER: Your Honor, yes, those are the two
2 standards that I understand -- I guess I am interpreting
3 what you are reading from your paper. But those are the
4 standards that I interpret us to be talking about, the
5 802.11 having to do with wireless, and the H.264 having to
6 do with video.

7 THE COURT: Is the first part of that sentence
8 also accurate, that you entered into binding contractual
9 commitments with IEEE and ITU, committing those to that
10 RAND process?

11 MR. JENNER: Well, yeah, that is really what the
12 issue is, your Honor, in terms of what the assurance is.
13 The assurance is that we would -- that Motorola agreed to
14 license those standard essential patents on RAND terms.

15 THE COURT: All I am asking is -- I think you
16 just agreed with me. I am not asking you if you did it or
17 not, I am just asking you if that's what you are supposed
18 to do. I think the answer to that is yes.

19 MR. JENNER: Yes. Enter into a license on RAND
20 terms, that's right.

21 THE COURT: The second point that Microsoft asked
22 the court to declare is, and I will quote, "Microsoft is a
23 third-party beneficiary of Motorola's commitments to the
24 SSOs." Once again, let's stay away from the precise terms
25 that were offered and asked as a conceptual matter. I

1 think there is also no disagreement on that. Mr. Jenner,
2 am I correct on that?

3 MR. JENNER: Your Honor, that is correct, we would
4 agree that Microsoft can fairly claim to be the
5 third-party beneficiary of the assurance.

6 THE COURT: Now we get into the fun part. Number
7 three in Microsoft's list is, "When offering a license to
8 a third-party beneficiary of Motorola's commitments to the
9 SSOs," Microsoft phrases it, "Motorola must offer RAND
10 terms and conditions."

11 I'm reading that as a legal matter. And I would say,
12 yes, that is true, because that's what your agreement
13 says, is that you will offer them on RAND terms and
14 conditions. If you read that, however, to be, must
15 Microsoft make an offer which is within the range of RAND
16 terms and conditions, then you set up what I believe to be
17 Microsoft's issue in this, which is the contention that,
18 no, the terms were so outside the available bandwidth that
19 it is not RAND terms and conditions.

20 Bear with me, but I think what that then asks me to do
21 in that third one is to determine what the RAND terms and
22 conditions for those two technologies are so that I may
23 then attempt to determine if Motorola's offer to Microsoft
24 was within that range.

25 Mr. Jenner, is that an accurate statement of what your

1 contending the issue is in this?

2 MR. JENNER: No, your Honor. Actually, it is
3 Microsoft's contention, but I will state my two cents on
4 this. First of all, we do not agree that the offer must
5 itself be RAND terms, because nobody knows at the time of
6 the offer what the other party is going to think the RAND
7 terms are. We contend that the final agreement must be
8 RAND terms. But even if you were to conclude that the
9 offer itself must be RAND terms, we submit that Motorola
10 did offer RAND terms. And that gets to the conclusion
11 indeed it would require your Honor to figure out what RAND
12 terms are, either for purposes of the offer or the final
13 agreement. That's why we submit that is a factual issue.

14 THE COURT: All right. Mr. Harrigan, would you
15 like to respond to that analysis?

16 MR. HARRIGAN: Yes, your Honor. First of all, the
17 issue as stated addresses the fact that Motorola's
18 contention is that it can make an exorbitant demand for
19 standards-essential technology and still be complying with
20 its RAND obligations as long as it will eventually enter
21 the RAND arena. That is the fundamental issue in this
22 case.

23 Our position is very clearly that -- And I think the
24 court may have said itself, you can't comply with your
25 RAND obligations if you start the negotiation by demanding

1 an exorbitant royalty. We believe that is a distinct and
2 very important legal issue. If the court agrees that is
3 the obligation they have under the contract, then we have
4 a shot at getting these parties actually to enter the RAND
5 arena. If the court concludes that Motorola is correct,
6 in that it can literally make an outrageous royalty demand
7 without breaching its RAND obligations, as long as it says
8 it is willing eventually to arrive at a rate that is
9 within the RAND arena, then they will continue to use this
10 holdup technique that they are using, where they threaten
11 an injunction if Microsoft or other parties do not
12 negotiate in response to an outrageous demand. And so I
13 think that that issue as stated there is an important and
14 distinct issue.

15 The next question is whether in fact their current --
16 the demand embodied in their two demand letters --

17 THE COURT: Let's stop there for a minute, if I
18 can cut you off. Answer me this: How do I get out of
19 this very dark inside of this paper bag? Motorola says,
20 this technology is so wonderful that a RAND term
21 appropriately is \$1 a unit. Microsoft responds, this is
22 run-of-the-mill stuff, you're lucky we are buying it, the
23 RAND term is 1¢ a unit. Whose view of what is the RAND
24 term do I accept, or is there a third alternative, which
25 is I determine the RAND value, and then see if it is

1 necessary to answer question three, namely was the initial
2 offer inside it?

3 MR. HARRIGAN: Your Honor, I think, first of all,
4 the way that we have approached this reflects the terms
5 and conditions of the letters that we received. And that
6 is, this is not a matter of is this technology worth a
7 royalty of 2.25 percent. This is a matter that they are
8 asking for 2.25 percent of the end-product price of
9 products where their contribution to the technology varies
10 over an enormous range, and in most cases is minute.

11 We believe that the court does not need to decide what
12 the RAND arena is in order to decide these summary -- this
13 summary judgment motion. The court merely needs to
14 conclude what a RAND rate is not. It is not 2.25 percent
15 of the price of, for example, a \$300 laptop with
16 Microsoft's operating system in it, and a \$2,000 laptop
17 with Microsoft's same operating system in it, to which
18 Motorola's contribution in both cases is infinitesimal
19 compared to the value of the operating system, much less
20 the product.

21 In other words, this is internally disproportionate to
22 the pricing base on which the 2.25 percent is based. It
23 cannot be RAND, because it bears no relationship to the
24 proportionate contribution of the technology when you base
25 the rate on a price that doesn't reflect the value of that

1 technology -- or I should say a wide range of prices, none
2 of which reflect the value of that technology.

3 THE COURT: Mr. Jenner, would you like to respond?

4 MR. JENNER: Thank you, your Honor. First of all,
5 I would start by saying I think Mr. Harrigan has just made
6 the point for me, that this is replete with fact issues.
7 Everything that he raised requires the court to make
8 determinations as to what is or is not reasonable.

9 I think you have to go back to the policy of the
10 standards committee in which the standard, to which
11 Microsoft is a beneficiary, states that they take no
12 position on what a RAND rate is, they leave that to the
13 parties to negotiate.

14 I am not suggesting that Motorola should come in and
15 say we want 50 percent royalty on all your products, but I
16 think it is appropriate for Motorola to make a starting
17 offer and expect to enter into negotiations, which is what
18 the standards bodies expect.

19 But any way you approach this, whether you have the
20 benefit of prior negotiations or have to look at this
21 afresh, your Honor is being called upon, if it goes this
22 far, to make an analysis of all the factors that would be
23 determinative of what a reasonable and nondiscriminatory
24 offer would be, whether that is value of the technology,
25 number of patents that a party has, proportionate value of

1 the patents, prior offers that are similar as to which
2 this royalty rate could be compared, and so on. Every
3 single aspect of that requires fact determinations.

4 So while this is something your Honor may need to get
5 into in a trial, I submit that it is not the least bit
6 appropriate for determination on summary judgment.

7 THE COURT: Well, let's set aside that question
8 for a moment. My reading of that policy statement is that
9 you couldn't convince the IEEE to say that 10¢ a unit was
10 the proper royalty. I am not sure that I can carry it as
11 far as Motorola reads that.

12 It seems to me that they are using the term
13 "reasonable," and they are not giving us a lot of
14 landmarks as to what that word means. This really is the
15 key for the court in this.

16 All right. Gentlemen, that's helpful. Let me tell
17 you where I am thinking about going, and ask for your
18 comment on it. I am going to be setting a discovery
19 cutoff for what we call the breach of contract claims,
20 what you call the RAND claims. I am inclined to do that
21 somewhere in June, simply because I don't want to spring
22 this on you. If you tell me that you can do it earlier
23 than that, I would welcome that news.

24 And then we'll set up a mini-trial on the question of
25 what the contract means. It seems to me I need to know

1 what the contract means. It may be that Mr. Harrigan is
2 correct, and that I can interpret the contract to put some
3 offers completely out of bounds. It seems Mr. Jenner just
4 conceded that at some point he would agree with that. I
5 think his standard was 50 percent of the price of the
6 product. If that is the principle that is established,
7 then we are just negotiating about the price, in the
8 famous words of Winston Churchill.

9 The question then would be, setting aside a
10 determination of what that rate should be, I would hope to
11 clear the decks on the question of what the contract
12 means. I appreciate that -- There may be some chance
13 that once you know what the contract means, you would
14 rather have the businesspeople deciding what the royalty
15 rate is, as opposed to eight good citizens of the Western
16 District of Washington.

17 In terms of when that trial would take place, it could
18 possibly be as early as this summer. It depends in part
19 on what you are telling me is the status of discovery.

20 Just to change this up, Mr. Jenner, I will start with
21 you. Where are you on discovery, and how does that idea
22 as a way to proceed strike you?

23 MR. JENNER: Your Honor, the general framework is
24 something we can work with. I guess the only thing I
25 would suggest is that your Honor consider reverting to the

1 prior schedule for purposes of RAND only. The difference
2 would be, I think instead of a June discovery cutoff --
3 and I will explain why in a moment, we would like to stick
4 with the July cutoff that you had before. The reason for
5 that is that we had -- as I think you know, we had a large
6 trial in International Trade Commission in January. All
7 the parties -- certainly all of Motorola's resources have
8 been directed towards preparing for and conducting that
9 trial. And we did that with the reliance on that July
10 discovery cutoff, so that we could get the discovery we
11 wanted for this done between now and July.

12 We have in mind probably at least about a dozen
13 depositions I can reel off, if you want to hear about
14 them. We think that we need this time between now and the
15 original cutoff to be assured of having the full
16 opportunity to prepare for the eventual trial.

17 We also think, based on the recent experience that we
18 had in the Trade Commission case, where the parties had
19 expert witnesses dealing with the policies of the
20 standards organizations as they affect what the contract
21 means, that your Honor would benefit from similar expert
22 testimony, so that there should also be a window of expert
23 testimony.

24 I would submit that the schedule that you originally
25 had which headed towards, I believe, a November-ish trial

1 date would accommodate all of that. It would not have any
2 of the patent issues, obviously, but it would still work
3 for the contract issues, and it would give us the time
4 that we thought we would have originally for getting the
5 discovery done.

6 THE COURT: I will ask Mr. Harrigan next. I will
7 tell you, unlike the Court of International Claims, I
8 don't have an unlimited amount of time. Your trial in
9 this matter is probably going to be slotted for six days.
10 However you want to spend your part of it, that's fine. I
11 have tended not to find expert witness testimony terribly
12 helpful. Mr. Harrigan.

13 MR. HARRIGAN: Yes, your Honor. There are a
14 number of factors that I think the court should consider
15 in determining the timing here. First of all, we did file
16 this case before both the proceeding in Germany and the
17 ICC proceeding to which counsel just referred. There are
18 potential injunctions being sought in both of those
19 proceedings that would be very injurious to Microsoft.
20 One of the items of relief we are seeking on the two
21 motions -- the two partial summary judgment motions now
22 before the court is a determination that there will be
23 no -- there is no injunctive relief available, A, in the
24 RAND context, and, B, in particular in this situation,
25 because Microsoft remains entitled to a RAND license, and

1 has stated it will accept a RAND license. I believe that
2 the court can rule on summary judgment on that issue
3 without any discovery.

4 We obviously also believe, your Honor, that you can
5 rule on the issue of -- on the motion to which we have
6 been directing our attention so far today without any
7 discovery. We believe that the question of whether
8 Motorola can make an outrageous, non-RAND demand, and
9 still be complying with its RAND obligations is a pure
10 legal issue that the court can decide without the
11 discovery.

12 We also believe that the question of whether the offer
13 or demands that it made are RAND can be decided without
14 presenting any disputed issues of fact.

15 If you look at our presentation on that, and I will
16 not repeat what I said before, it can be readily
17 determined from undisputed facts regarding the prices of
18 these products and the role of Motorola's technology in
19 those products that a flat 2.25 percent rate, based on
20 end-product price over widely varying prices with a single
21 level of contribution, is not reasonable.

22 Your Honor, the real point here, however, is that
23 Motorola is using this holdup technique, making an
24 outrageous demand and threatening an injunction. It is
25 using it in the German proceeding, it is using it in the

1 ICC proceeding.

2 If the parties are ever going to get into the RAND
3 arena and negotiate a license the way this system is set
4 up, the first thing that needs to happen is that Motorola
5 needs to be told by a federal court that they cannot use
6 this technique, and that what they have demanded in these
7 letters is, based on undisputed facts, an outrageous
8 demand that is not within the RAND arena, and is therefore
9 a breach of their obligations. That ruling would have
10 literally worldwide significance, both in this case and in
11 other cases. In particular, it would have an impact on
12 these two pending matters in the ITC and in Germany, both
13 of which rulings are going to be made before the court
14 would ever get to an answer in this case based on the
15 schedule that your Honor just outlined.

16 That is why we filed these motions last summer,
17 because of the importance of getting this determination,
18 to put an end to the methodology and tactics that Motorola
19 has been using, and which it is continuing to use. If it
20 is once determined that what they have done here is a
21 breach of its RAND obligations, then this case will go
22 back to being like all the other RAND negotiations are
23 supposed to be, and Microsoft can use the standard without
24 worrying that it is going to be forced to pay an
25 exorbitant rate or be enjoined, and the parties will know

1 that they are going to have to negotiate a real RAND rate,
2 and they will do it.

3 But as long as Motorola thinks it can get by with this
4 tactic that it uses, we are never going to get there.
5 Their basic approach is, we are allowed to make any
6 exorbitant demand we want without breaching our
7 obligations, and as long as we are willing to say we will
8 eventually arrive at a RAND rate, then we are okay. In
9 fact, that is an abuse of the standards and the purpose of
10 the standards. It is what this -- it is what all of these
11 disputes are about. That's why we are asking this court
12 to make this ruling, which we believe can be done in
13 rather short order.

14 One of the suggestions we were going to make is, we
15 have a Markman hearing scheduled for March the 9th. And I
16 think that the court could potentially defer that until
17 June, when the second one is set for, and use that time to
18 deal with the issues presented on these motions, which we
19 believe are urgent and fundamental.

20 THE COURT: There are two paths that you have set
21 out for me, Mr. Harrigan. One is that all Mr. Jenner
22 needs to do is agree that Motorola's demand was outrageous
23 and not RAND. Somehow I don't think he is going to do
24 that. And, secondly, none of the briefing that I have
25 seen coming out of Microsoft addresses the argument I

1 think you are now making, which is, Judge, there are some
2 factual situations where the parties don't -- they agree
3 on the facts, they don't agree on the implication that is
4 drawn from them, but it is so outrageous or beyond the
5 realm of reality that I can ignore the genuine issue of
6 material fact under the old CR 56 standard, and rule
7 rather in the abstract. Do you have any authority for
8 that proposition?

9 MR. HARRIGAN: Your Honor, the ruling in the
10 abstract I believe is issue number three, which is that
11 Motorola is not allowed to make an outrageous demand
12 outside the RAND arena simply because it says it will
13 later negotiate a RAND rate. That is a legal issue. That
14 demand -- If we assume that it is exorbitant, that demand
15 is a breach of contract.

16 The second question is --

17 THE COURT: Stop there. Save the second question.

18 Mr. Jenner, are you contending, as I thought you were
19 in your pleadings, that you thought your offer was a RAND
20 offer, and that your other simultaneous argument is that
21 it is simply -- you need to begin negotiations? Did I
22 misunderstand that is your position?

23 MR. JENNER: No, your Honor. The fundamental and
24 primary submission we make is that our offer was in fact
25 reasonable RAND. In fact, when the time comes to adduce

1 what the facts are, we are going to show your Honor
2 literally dozens of license agreements where the offers
3 were virtually the same offer that was made to Microsoft.
4 We have recent license agreements -- This was all brought
5 into the ICC proceeding. These are recent license
6 agreements where licensees have taken the offered rate of
7 2.25 percent. We are not hanging our hat on the notion
8 that we can offer anything, even though we think that is
9 what the proof will show the policies permit. We are
10 going to submit that we made a RAND offer that is
11 consistent with our entire licensing program and other
12 license agreements, and that as a factual determination it
13 was reasonable.

14 Can I address a couple of the other points that
15 Mr. Harrigan made?

16 THE COURT: I will give you that chance in a
17 moment here. Mr. Harrigan, I cut you off before you got
18 to your second point.

19 MR. HARRIGAN: Your Honor, I would like to point
20 out that Mr. Jenner did state that their position is that
21 they do not have to make a RAND offer coming out of the
22 box. We believe that is a legal issue, and that is
23 clearly what they contend in their papers, and that the
24 court should decide that legal issue.

25 The second issue is, are there material issues of fact

1 regarding whether the demands they made are outside a RAND
2 arena? We believe, if you look at the undisputed facts
3 that we have presented in our motions, it is clearly an
4 unreasonable demand to say you get 2.25 percent of the
5 price of a \$300 laptop with Microsoft's operating system
6 in it, and a \$2,000 laptop with the identical operating
7 system in it, where Motorola's only contribution to that
8 product is exactly the same, a small part of Microsoft's
9 operating system.

10 If you look at their letter, your Honor, they identify
11 the products. Every laptop. That is what they say, each
12 laptop, each cell phone, the whole range of pricing, where
13 the prices vary based on what kind of case it is in, how
14 much memory it has, how fast it is, all the other things
15 that have absolutely nothing to do with Motorola's
16 technology. In other words, there are no factual disputes
17 about the wide variation and pricing and the fact that it
18 has nothing to do with Motorola's technology.

19 Therefore, as a matter of undisputed fact, their
20 2.25 percent demand for end product -- based on
21 end-product pricing is unreasonable.

22 Now, you don't have to decide what is reasonable in
23 order to decide what is unreasonable on the basis of those
24 facts.

25 If you look at their brief in response to ours, what

1 do they say? They say, well, we got 2.25 percent in this
2 instance. Well, they do not provide the court with any
3 evidence of a comparable situation, that is, a situation
4 where they have gotten 2.25 percent of the prices of a
5 wide range of products without any relationship to the
6 contribution of their technology. If they could show
7 that, that might set up some kind of a factual dispute.
8 Although, in reality, what it would demonstrate is this
9 strategy has worked before.

10 But in fact, they have -- The point here is, your
11 Honor, if you look at these letters, these specific
12 demands, the specific products they list as to which this
13 2.25 percent rate applies, and the undisputed fact that
14 their technology does not change in the context of those
15 different products, and yet the prices vary over orders of
16 magnitude, a 2.25 percent flat rate based on end-product
17 prices cannot be reasonable. And there is no material
18 fact question there.

19 Now, if you agree with us after looking at these
20 materials, and rule that in fact their demand is a breach
21 of their obligation to propose and offer a RAND royalty,
22 that should put this case -- that should make this case
23 like every other case, where the courts don't have to
24 decide anything, because the parties will then be in a
25 RAND arena and Motorola's tactic will have been held to be

1 a breach of its obligations.

2 THE COURT: I wish I had more of those cases in my
3 docket where I didn't have to decide anything.

4 Mr. Jenner, it is your turn.

5 MR. HARRIGAN: Your Honor, I have one other
6 question. I am sorry to interrupt. We would also like to
7 know, in view of the fact that this issue was placed
8 before this court last summer, whether Motorola will agree
9 that it will suspend any request for injunctive relief in
10 the ITC -- or exclusion order in the ITC, and injunctive
11 relief in the German case, while the court decides this
12 question, rather than have -- places where this issue is
13 not squarely presented as it is here, dealing with it.

14 THE COURT: Mr. Jenner, I think that question was
15 addressed to you.

16 MR. JENNER: I will start with that then, your
17 Honor. First of all, I find it very interesting and
18 strange that Microsoft is invoking your Honor's time as a
19 way to address further the same questions that it is in
20 fact addressing in Germany and in the ITC. I know for a
21 fact, because I was in the ITC proceeding, that they are
22 raising similar RAND defenses there. So it is not as if
23 they don't have an opportunity to raise these defenses
24 where they think they apply.

25 I am a little surprised to hear that the actual

1 purpose of what they are asking your Honor to do is not to
2 rule per se for the benefit of the Seattle litigation, but
3 rather to do something that they can invoke and carry over
4 to Germany and the ITC instead of raising their defenses
5 where those cases are in existence.

6 Be that as it may, we are going to take the position
7 based in part on the testimony of Microsoft's own
8 managerial employees that one is entitled, in the absence
9 of negotiations, to pursue all available IP remedies,
10 including injunctive relief. This has been stated by
11 Microsoft's own manager of standards. That is part of the
12 reason why we think we need discovery.

13 I understand full well why Microsoft would like to cut
14 us off completely from the opportunity to have our
15 discovery, but by the same token, the issues they are
16 raising are the reasons why we need our discovery.

17 We believe that there are a number of sources of
18 information that we ought to have the opportunity to
19 pursue consistent with the schedule that was previously in
20 place.

21 We don't think the fact that they want your Honor to
22 weigh in on proceedings in Germany and the ITC is a reason
23 why our right to discovery should get aborted.

24 They say they stated they will accept the RAND
25 license. The way I read their pleadings, it doesn't say

1 that at all. They have basically taken the position that
2 they want your Honor to rule that they are entitled to a
3 RAND license, but to this very day they still continue not
4 to ask for one. And the standards organizations all talk
5 about licenses being made available to applicants. They
6 continue to refuse to apply for a license. They continue
7 to refuse to accept any of the patents as essential. They
8 certainly haven't in the complaint they filed asked your
9 Honor to determine what a RAND rate is, even though at
10 some point it may come down to that.

11 I submit, your Honor, that on a record showing dozens
12 of license offers by Motorola, all in the 2.25 percent
13 range, that led to negotiations, will prove this, where
14 the parties were able to consider the offsetting value
15 that the licensee brings to the table in the way of cross
16 license patents, Microsoft certainly has cross license
17 patents, all of these situations, every one of them, has
18 resulted in negotiations, and they lead to all the
19 considerations being considered that Microsoft has raised.

20 If they want to say that the end product is the wrong
21 product on which to apply the royalty rate, they can do
22 that in negotiations. Everyone else has done that. They
23 refuse to do that. Instead, they want your Honor to
24 become the arbiter in the way of an advisory opinion as to
25 what the rate is.

1 We submit that the evidence will show 2.25 percent was
2 commonly applied. But the point for present purposes is
3 that is inherently factual. Everything that Mr. Harrigan
4 says raises one factual issue after another as to
5 reasonableness, as to how it compares with other things,
6 whether or not and why it is too big or too little. Every
7 last bit of that is a factual question, going to
8 reasonableness and related considerations.

9 I don't imagine how that can be appropriate for
10 summary judgment, but of course we leave that to your
11 Honor. We appreciate that you are going to decide that
12 soon, and we will deal with that.

13 But as far as further proceedings, I don't think that
14 counsel has raised a justification, wanting to take this
15 to foreign courts and the ITC, for depriving Motorola of
16 the right to take discovery that it thought it was going
17 to be able to get in an orderly process leading to trial.

18 I notice that your Honor said you are probably not
19 much interested in expert testimony. I do want you to
20 know that a number of experts, including people who sat on
21 the standards organizations patent policy committee, did
22 give testimony in Washington -- in the ITC proceeding. I
23 would submit to your Honor we would try to explain to you
24 in a submission, if you would take it, why we think that
25 would be helpful.

1 But whether or not the expert phase is something your
2 Honor wants, we do believe that the original fact
3 discovery period shouldn't be taken away from Motorola,
4 even if Microsoft doesn't want it.

5 MR. PALUMBO: Your Honor, this is Mr. Palumbo.
6 Just on the schedule, you mentioned June. I think the
7 existing discovery cutoff is June 15, and then there is a
8 July 24 dispositive motion cutoff. It sounds like both of
9 those would work for your Honor. It would work for
10 Motorola. I am new to this, but given that Motorola has
11 evidence in the summary judgment record that it has
12 licensed these identical patents to other parties at
13 2.25 percent of the end price, and that has been accepted,
14 I don't see, facing that evidence, how you could decide
15 that this is, as Mr. Harrigan contends, so exorbitant that
16 it is outside the range. Nor can I imagine how Motorola
17 could figure out the value of these patents to this broad
18 range of differently priced Microsoft products without
19 sitting down and discussing and negotiating with Microsoft
20 as to all those products, something which Motorola has
21 repeatedly said it is willing to do.

22 So if we simply proceed with the existing schedule on
23 the discovery and dispositive motion cutoff, the parties
24 have the opportunity, if they choose to do so, to attempt
25 to negotiate a RAND term in the interim. But ultimately,

1 if they are not able to do it, you will have to decide the
2 specific RAND terms.

3 I think in order to decide whether something is or is
4 not RAND, you have to decide what RAND is for these
5 products and these patents.

6 UNIDENTIFIED ATTORNEY: Your Honor, may I make a
7 few comments?

8 THE COURT: Actually, no, we are running out of
9 time here. Mr. Palumbo, you may be new to the party, but
10 you do know the record, which is that it is a June
11 discovery cutoff.

12 MR. JENNER: Your Honor, this is Jesse Jenner. I
13 apologize for thinking it was July.

14 MR. HARRIGAN: I would like to make -- read one
15 sentence out of our reply brief that will refute a
16 statement that counsel made.

17 THE COURT: All right.

18 MR. HARRIGAN: The reply brief states, "Microsoft
19 is seeking and remains ready and willing to take a license
20 to Motorola's H.264 and 802.11 declared-essential patents
21 on RAND terms." That is at page 9.

22 Microsoft has in fact stated that it will do that. It
23 has actually put a deposit of 1.5 million euros in place
24 in the particular German case for purposes of getting a
25 RAND license on what it believes to be RAND terms.

1 Based on the fact that the court is running out of
2 time, I will not further respond to Mr. Jenner's
3 arguments, other than to say that whether the other side
4 needs discovery depends -- needs discovery to respond to
5 these motions depends upon whether there are actual
6 material disputed facts. And for the reasons I have
7 previously stated, we believe there are not. There will
8 be disputed facts if the court has to actually set a RAND
9 rate. We don't think there are such disputed facts for
10 the court to determine that the demands we got are not
11 RAND.

12 THE COURT: Thank you. This has been helpful. As
13 I mentioned, we will be ruling on Microsoft's motion,
14 found currently in the docket at 77. You do have some
15 deadlines in the case schedule. I would urge you all to
16 take a look at those. I am not inclined to move them up
17 in terms of cutting things off, but I have very little
18 interest in moving them out either.

19 I will close simply -- It seems to me what I have
20 taken away from this discussion is, there are some
21 obviously contested issues of fact. If we are looking at
22 this from a reasonableness point of view, we will do some
23 investigation on the question of is unreasonableness
24 something that I can decide as a matter of law.

25 Counsel, thank you for making yourselves available.

1 **We will be in recess.**

2 **MR. HARRIGAN: Your Honor --**

3 **THE COURT: Mr. Harrigan, that was your voice?**

4 **MR. HARRIGAN: That was my voice, your Honor.**

5 **Thank you.**

6 **THE COURT: Bye.**

7 **(Adjourned.)**

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CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning